

EXPLANATORY MEMORANDUM TO
THE REGULATION OF SOCIAL HOUSING (INFLUENCE OF LOCAL
AUTHORITIES) (ENGLAND) REGULATIONS 2017

2017 No. [XXXX]

1. Introduction

- 1.1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the Instrument

- 2.1. This instrument reduces the influence local authorities have over private registered providers of social housing. It restricts the percentage level of officers a local authority may nominate as board members of a private registered provider and removes a local authority's ability to hold voting rights as a member of a private registered provider.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1. None

Other matters of interest to the House of Commons

- 3.2. This instrument extends to England and Wales but its territorial application is solely England.
- 3.3. In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

4. Legislative Context

- 4.1. The Housing and Planning Act 2016 contained a package of deregulatory measures (in sections 92, 94 and in Schedule 4) aimed at reducing public sector control over private registered providers to enable the Office for National Statistics (ONS) to reconsider the classification of private registered providers. This instrument is in pursuance of the measures in section 93. This provision is directed at local authorities. The other provisions (in sections 92, 94 and in Schedule 4) of the package affect the social housing sector impacting on the Social Housing Regulator and were commenced on 6th April 2017.

- 4.2. Section 93 confers on the Secretary of State a power to make regulations that limit or remove the ability of local authorities to exert influence over private registered providers of social housing.
- 4.3. Private registered providers are businesses which are registered with the Homes and Communities Agency and provide social housing as defined by section 80 of the Housing and Regeneration Act 2008 (c. 17). The function of the Regulator of Social Housing is carried out by the Homes and Communities Agency in accordance with section 92A and subsequent sections of that Act.
- 4.4. A local authority officer may be a person elected as a councillor or an employee of the local authority who is, or will be, appointed to the board of the private registered provider.
- 4.5. Local authorities through entering into an agreement with a private registered provider, usually where they are transferring part of their housing stock to that organisation, may include a proviso that the local authority be able to appoint an agreed number of officers to the private registered providers board. This arrangement will be included in the private registered provider's constitution.
- 4.6. From October 2015, the ONS classified private registered providers as public bodies, with their debt appearing on the Government's balance sheet due to public sector influence over the sector. An area of control identified by ONS is that of a local authority over a private registered provider where the local authority has the ability to appoint an officer to the board and has voting rights as a member of this organisation. This is frequently the case where local authorities have transferred their housing stock to a private registered provider as part of a "stock transfer".

5. Extent and Territorial Application

- 5.1. The extent of this instrument is England and Wales.
- 5.2. The territorial application of this instrument is England.

6. European Convention on Human Rights

- 6.1. The Minister of State for Housing, Planning has made the following statement regarding Human Rights:
- 6.2. In my view the provisions of the Regulation of Social Housing (Influence of Local Authorities) (England) Regulations 2017 are compatible with Convention rights.

7. Policy Background

What is being done and why

- 7.1. In October 2015, the Office for National Statistics (ONS) announced that private registered providers would be classified as public bodies, with their debt appearing on the Government's balance sheet, due to public sector influence on the sector. They were classified as public sector due to controls over their business being exerted by central government through the Homes and Communities Agency and local authorities. The decision to bring all 1,600 private registered providers in England and their c.£70bn of commercial borrowing on to the public accounts means that future borrowing will be added to the deficit. Private registered providers play a critical role in delivering new homes. In England they deliver approximately a third of all new homes annually.

- 7.2. Currently some local authorities, mainly because of stock transfer agreements to private registered providers of social housing, have the ability to appoint local authority representatives to the board of the private registered provider. In agreeing a stock transfer a local authority and private registered provider will enter into a contractual agreement which will cover all aspects of transfer including the sale of the housing and the future relationship between the local authority and the private registered provider.

Board membership – nomination by a local authority

- 7.3. The board of a private registered provider of social housing is responsible for managing and leading the strategic direction of the private registered provider. This instrument reduces public sector control by local authorities over private registered providers of social housing by limiting the ability of local authorities through the nomination of board members of a private registered provider. A local authority will only be able to nominate board members to a proportion representing 24% of the total board membership. This will still allow a local authority to be represented on the board and to participate in any voted business, whilst preventing it from blocking any voted decisions (as this may be considered to constitute control).
- 7.4. We are allowing a period for local authorities to take action to reduce their representation on the board of a private registered provider. If no action has been taken by six months after the regulations are made (described in the regulations as the “appointed day”) then the private registered provider will have the ability to remove local authority-nominated board members to the required level of 24% of the total board membership.
- 7.5. Some constitutions of private registered providers may include a provision that a local authority officer appointed to the board must be present at board meetings of the private registered provider in order for that board to be quorate. With these regulations we are removing this requirement. It will be for private registered providers to adjust their constitutions and if necessary amend their quorum provisions.

Share of membership – voting rights

- 7.6. The constitution of a private registered provider may include the allocation of a voting right to members. Members may exercise control over the private registered provider in accordance with the private registered provider’s constitution. Through the constitution some private registered providers allocate a share of membership (akin to a shareholder) to different groups (eg tenants, independent members). Generally, each group holds a third of the votes cast (as members) at the annual meetings. In some cases, a local authority may be provided with an additional vote, sometimes referred to as a golden share, which affords them the opportunity to block constitutional changes.
- 7.7. The instrument removes a local authority’s ability to hold a share of membership or cast votes as a member including, for example, at an annual general meeting. This ensures that a local authority is unable to block a constitutional change proposed or vote on other issues which may be subject to a vote by members, thereby removing this control over the private registered provider. The local authority will retain its ability to vote whilst voting rights are being re-assigned in compliance with this instrument. If by the appointed day constitution changes have not been agreed, the

local authority vote is removed and all such votes re-assigned pro-rata amongst the remaining members.

Other constitutional change

- 7.8. A private registered provider within its constitution may set a percentage figure for a majority vote to be agreed. This instrument sets the majority at not more than 75% and will override any constitution that is not compliant with this. In conjunction with the above provision for 24% board membership, this ensures that a local authority will not be able to block any proposals.
- 7.9. If the constitution of a private registered provider requires the provider to seek the approval of the local authority before it can make a change to its constitution, from the appointed day, this instrument allows the private registered provider to change its constitution without seeking the local authority's permission. In the interim, a local authority is unable to prevent a constitutional change.
- 7.10. This instrument will override any contrary terms within a contract that has been entered into between the private registered provider and the local authority in respect of board appointments, voting on the board and membership of the private registered provider by the local authority.
- 7.11. The instrument is intended to come into force in sufficient time to allow an interim period of six months for local authorities and private registered providers to take the steps set out in the instrument to adjust board membership, reassign voting rights and amend their constitutions.

Exemption for Arms Length Management Organisations

- 7.12. The instrument provides for an exemption where the private registered provider is also an arms length management organisation. Arms length management organisations (ALMOs) are established by local authorities to manage their housing stock. The rationale for this exemption is that these organisations were already classified to the public sector. This exemption means that ALMOs may continue to have more than 24% of board members nominated by local authorities and their shares will be held by local authorities.

8. Consultation outcome

- 8.1. No formal consultation has been carried out for these regulations. We have taken views from the National Housing Federation, Local Government Association, national federation of arm's length management organisations, a selection of private registered providers and local authorities.
- 8.2. The main points raised by the National Housing Federation and private registered providers concerned their ability to appoint someone, who may be from a local authority, to a board vacancy following open and fair process where they hold the skills which the private registered provider needs. Also they expressed concern that we should ensure that not only constitutions were amended but other contractual documents are included so there is not a conflict between documents. They also requested a period of time to allow for adjustments to be made
- 8.3. The instrument makes express provision that its provisions override other documents, where applicable. It allows until the appointed day for those affected to take action.

- 8.4. In respect of local authorities, the points made by consultees specifically related to retaining oversight of the activity of a private registered provider and allowing a local authority officer still to be able to be appointed chairperson of the private registered provider.
- 8.5. In this instrument we have sought to retain a local authority role within these organisations whilst meeting the objective of reducing local authority control over these private organisations. Private registered providers may still appoint local authority officers as a chairperson and also appoint other local authority officers to their board in free and open competition, where these officers demonstrate the skills required by the private registered provider's board.
- 8.6. The National Federation of Arms Length Management Organisations wished to ensure that this instrument did not affect their members as they are wholly owned by local authorities and their finances are accounted for within the local authority accounts, classifying them as public sector. We have fulfilled this request by exempting arms length management organisations.

9. Guidance

- 9.1. The Department for Communities and Local Government does not intend to produce guidance on these regulations.

10. Impact

- 10.1. There is no impact on business, charities or voluntary bodies as private registered providers of social housing, whilst unchanged in legal status, have been classified by the Office for National Statistics (ONS) to the public sector.
- 10.2. These Regulations have an impact on local government and on private registered providers of social housing, which as noted above are currently classified as public sector.
- 10.3. An Impact Assessment has not been prepared for this instrument.

11. Regulating Small Business

- 11.1. The legislation does not apply to activities undertaken by small businesses.
- 11.2. Private registered providers are regulated by the Homes and Communities Agency as Regulator for Social Housing.

12. Monitoring and review

- 12.1. These Regulations contain no review clause. Local authorities and Private registered providers will need to satisfy themselves that they have taken the action required to comply with this instrument.

13. Contact

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